IMPACT OF THE WORLD TRADE ORGNISATION (WTO) ON CHINA'S TRADE POLICY – CASE STUDY ON THE TELECOMMUNICATIONS SECTOR

INTRODUCTION

> 'China…will join the community governed by the rule of law [WTO] … it is also the best way to promote reforms in China and stability in the region.'[1]
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> *Charlene Barshefsky, former United States Trade Representative on approval of China's permanent normal trade relations.*

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1 USA Today, September 20, 2000 available on Lexis. Declaration by Barshevsky after US Senate voted to approve permanent normal trade relations (PNTR).

This paper utilises the telecommunications services as a case study, and assesses the impact of the WTO accession on Chinese trade policy. Since the telecommunications sector was one the most difficult areas for the Chinese to open up for trade, this case study illuminates the extent of the WTO's impact on Chinese trade policy making. Previous to the WTO, trade in the sector was prohibited: however due to WTO accession, China has opened up the telecommunications services sector. Consequently, trade policy which was mainly directed by the trade ministry (Ministry of Commerce MOFCOM) has the telecommunications related ministries more involved, and as a result, the policy making in the sector has also become a more complicated process.

Prior to WTO accession, the ministries related to telecommunications services had only limited involvement, and the ministries related to trade and foreign affairs took the lead in the negotiations. However, post-WTO, the telecommunications related ministries are getting more involved, complicating the generation of trade policy in the telecommunications sector. There were several near breaches of the WTO: they never made it to the dispute settlement mechanism, and were resolved before reaching the WTO.[2] These cases showed that the coordination of trade policy increasingly became more problematic after WTO accession. While China's WTO commitments have provided a more transparent trade regime, trade policy in telecommunications services has become pluralized and decentralized process, involving more diverse range of trade and telecom related ministries, as well as operators, and as such, created formidable challenges to WTO compliance.

This paper is in two sections: the first section provides a background to the WTO and China's telecommunication sector. The second section will examine the impact of WTO accession on trade policy in the telecommunications sector. I rely on WTO documents, representations and negotiations; governmental reports and fieldwork/ interviews.[3] I will particularly focus upon how turf wars, bureaucratic actors and central

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2 These near breaches are covered in the latter sections of the paper.

3 The findings are primarily based on fieldwork: I conducted 130 interviews in Geneva, Beijing, Shanghai, and Guangzhou. Interviewees included officials, governmental advisors and professionals involved in the negotiation and implementation of WTO agreements in China. These were in-depth, qualitative interviews, running over 1.5-3 hours in length, combined with participant observation in some cases.

local relations were influenced by WTO related reforms, and attempt to illustrate how trade policy after WTO accession had became a more complicated, fragmented process.

1 THE WTO AND CHINA

On 11 December 2001, China officially became a member of the WTO. This marked the end of the longest, most protracted accession negotiations in WTO/GATT (General Agreement on Tariffs in Trade) history.[4] Once ascended, China had to find a way to comply with the WTO commitment package that it had signed up to. This entailed much reform in trade policy, particularly in the formally closed sectors such as the telecommunications sector.

China had been one of the founding members of the GATT, but left after the Communist Revolution in 1949. China kept its borders tightly closed until 1978, and during this period, its domestic practices became counter to the ones of the GATT/WTO. Deng Xiaoping, the successor to Mao Zedong, advocated the 'Open-Door Policy' in 1978, when it was finally decided that the country was capable of enduring foreign influence and competition.[5] Even after its open-door policy, China continued to protect its infant industries by prohibiting trade liberalisation in its most underdeveloped and non-

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4 GATT is the predecessor to the WTO. It was succeeded by the WTO in 1995, and the history of the GATT is now regarded as the history of the WTO. For the purposes of this paper, when the history of the WTO is referred to, it points to the history of both the WTO and GATT unless otherwise specified.

5 China had foreign domination and a succession of unequal treaties for the last century and a half, which left the Chinese leadership relatively suspicious and cautious of foreign countries. One example is the closed policy before 'Open-Door policy of 1978-79" where the country kept its door closed and limited its trade and foreign relations, until the communist revolution had been completed and the society had stabilised. JK Fairbank and DC Twitchett *The Cambridge History of China* (Cambridge University Press Cambridge 1978) Volume I. The Ch'in and Han Empires.

competitive sectors, particularly its infant industries in telecommunications, banking and insurance.[6] As Long Yongtu, the Vice-Minister of the Ministry of Commerce (MOFCOM) formally the Ministry of Foreign Trade and Economic Co-operation (MOFTEC), and China's chief negotiator for GATT/WTO, rightly points out, 'countries with planned economies have never participated in economic globalisation'; in China's case, entry to the WTO is particularly important as it brings many reforms to its trade policy.[7]

The WTO is a forum for rule-based countries to negotiate and adopt the approaches necessary for the liberalization of trade.[8] Although China has been undergoing extensive economic reform, change occurs only slowly. According to Greg Mastel, even the enforcement mechanisms in the WTO[9] will not be sufficient to help

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6 The 'open-door policy' was articulated in the December 1978 Third Plenum communiqué and followed-up by a decision in 1979 to expand foreign trade and allow foreign companies to invest in China. This was an attempt to open China up to the global economy as well as to accelerate the country's modernisation.

7 I take a functional definition of trade policy – in this case how China's interests are represented in the WTO. N Lardy 'Issues in China's Accession Process' US-China Security Review Commission 9 May 2001 3 available at http://www.brook.edu/views/testimony/lardy/20010509.htm last visited 20 January 2002.

8 G Mastel *China and the World Trade Organisation Moving Forward without Sliding Backward* Paper for 'The First Five Years of the WTO' Symposium at 20. Available from the Georgetown Law School website last visited January 2002.

9 These enforcement mechanisms are the dispute settlement court and the trade review mechanism (TRM). Once a member of the WTO, China could be summoned to the dispute resolution court for breach of WTO agreements. The objectives of the trade review mechanism; (TRM-Annex 3 to the Marrakesh Agreement Establishing the WTO) is to periodically examine China's progress in implementing its commitments under the WTO.

China in addressing its ‘complex and opaque system of bureaucrats, provincial governments, and state-owned enterprises combined with its lack of rule of law’.[10]

A central problem for China joining the WTO is the fact that China is a ‘socialist market economy’; not a type of market envisioned at the time when the GATT was written.[11] As such, China must implement extensive reforms in its trade policy. The WTO is based on the theory of competitive advantage where is it believed that ‘liberalising trade’ – that is, minimising governmental interference with trade flows – would be beneficial to all governments.[12] The main purpose in the WTO is to act as a forum to reduce obstacles to trade by lowering tariffs and removing non-tariff barriers to ensure that trade flows as smooth, predictable and as free as possible. The rationale behind this has been that such a system would increase the demand for foreign goods, thereby increasing international trade, which would ultimately improve the welfare of the people from the member countries. However, China’s imports were traditionally constrained by the state plan, and licensing along with foreign exchange, remains under the control of

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10 Greg Mastel is the Director of the Global Economic Policy Project at the New America Foundation. *See* G Mastel *China and the World Trade Organisation Moving Forward without Sliding Backward* Paper for ‘The First Five Years of the WTO’ Symposium at 26. Available from the Georgetown Law School website last visited January 2002.

11 As Douglas Newkirk, former Assistant United States Trade Representative states, ‘[t]he GATT wasn’t written with a socialist market economy in mind’. (As quoted in R Bhala ‘Enter the Dragon: An Essay on China’s Accession Saga’ [2000] 15 *American University Law Review* 1469, 1480 available on Westlaw, last visited November 2001).

12 ‘Competitive advantage’ is an economic theory of Ricardo’s that is advanced in his book *The Principles of Political Economy* (1817). This theory demonstrates that free international trade increases the opportunities and profits available for economic actors. By an economic actor specialising in the resources or skills they are best at, they may increase their gains through the differential advantages in trade. *See* M Trebilcock and R Howse *The Regulations of International Trade* (2nd edn Routledge London 1999) 5.

the government that is in conflict with the WTO principle of free trade.[13] Even John Jackson, the more optimistic of WTO scholars, acknowledges that assimilation of China into the WTO is a 'formidable task'.[14]

China's national security interests and protectionist practices to help their internationally non-competitive telecommunications sectors survive make it difficult for China to allow foreign participation in the telecommunications sector. The reforms China will have to implement in the telecommunications are formidable, and it was anticipated that China will have serious challenges in reaching compliance with the WTO in the telecommunications sector. Difficulty in compliance indicates how China's existing trade environment is far from the ideals of the WTO: this also means that if China was to become a responsible member and comply with the WTO – trade policy would function quite differently after WTO accession.

In this paper, the telecommunications sector will be used as the core case study since it is widely agreed by commentators to be one of the most difficult sectors for China to open up to trade. Selecting one of the most contentious sectors as a case study will allow for the coverage of the full extent of the WTO impact on trade policy. The telecommunications sector is defined to include telecommunications equipment

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13 P Lovelock *The Evolution of China's National Information Infrastructure (NII) Initiative: A Policy - Making Analysis* (University of Hong Kong D.Phil. thesis 1999) 301.

14 Jackson is one of the more optimistic scholars for expanded membership of the WTO. He also is enthusiastic about China's capability as being a responsible member of the WTO. J Jackson *The World Trading System Law and Policy of Economic Relations* (2nd edn MIT Press Cambridge, Mass 1999) 291, also *see* D Kennedy 'The International Style in Postwar Law and Policy' 1994 *Utah Law Review* 7 at 100 for a commentary on Jackson's work.

production and services; this includes the category of Information Technology (IT) industries – 'the digitised information processing, storage and transmission sector that is the emblem of modern technology and the largest and fastest growing industrial sector and trade category'.[15] More specifically, telecommunications services under the General Agreement on Trades in Services ('GATS') will be focused upon.

The telecommunications sector in China

The Chinese telecommunications market is the fastest growing in the world; it is quickly becoming the largest for mobile telephone usage (136 million subscribers) and telephone-paging services (50 million subscribers).[16] When one considers that this is at only 9.2% in penetration level – compared to 40% and 50% in the US and Europe respectively – the Chinese domestic market has much potential.[17] Thus, one can see that Chinese in the context on telecommunications, it is as much about the 'WTO joining China' as it is 'China joining the WTO'. The impact of the WTO on telecommunications in China, and China's telecommunications market on the global community is significant.

Traditionally, the global telecommunications market has been comprised of state monopolies. Many countries have historically kept the telecommunications sector public

15 *See* M Borrus and S Cohen *Building China's Information Technology Industry: Tariff Policy and China's Accession to the WTO* BRIE Working Paper 105 November 1997 http://brie.berkeley.edu/~briewww/pupbs/wp/wp105.html 14 last visited Dec 2001.

16 'China Telecom Splits' Tuesday, 11 December 2001 *BBC News* available at http://news.bbc.co.uk/hi/english /newssid_1703000/1703965.stm last visited 18 January 2002. M Groombridge and C Barfield *Tiger by the Tail – China and the World Trade Organization* (The AEI Press Washington, D.C. 1999) 36.

17 S Harwood 'China and the WTO- The .Net Effect of Accession' available at http://www.hollandandknight.com/newsletters.asp?ID=250&Article=1447 last visited 06 February 2002.

and under government control due to national security interests. In addition to providing a country's population with telephone lines, telecommunications supports a nation's military and national security network. Since the 1980s, starting with AT&T in the US, developed countries began the process of deregulation and encouraging domestic competition within the telecommunications sector. With globalisation and improved transportation systems, the global telecommunications sector has made significant headway in international competition and liberalisation of trade. The telecommunication industry is a capitalintensive industry that needs economies of scale and strong professional expertise. Having reached a development level ripe enough for trade liberalisation, and possessing a comparative advantage, developed countries have been the driving-force behind the liberalisation of trade in the telecommunications sector. Naturally, however, developing countries with infant industries have been slow to follow this trend.

The liberalization of the telecommunications sector has been a sensitive issue in any country. It is of strategic importance with strong links to national security and integral to the preservation of sovereignty. Moreover it is a lucrative sector and in many countries constitutes a major source of governmental revenue.[18] In case of China, telecommunications liberalization is particularly difficult since telecommunications operators have traditionally occupied a protected status. Domestic telecommunications companies are still weak, and cannot compete with foreign entrants at the same level. Moreover, communications services have traditionally been an area of great importance since there is extreme sensitivity to the control of information and little freedom in expression. Relinquishing control of its telecommunications lines is sees as endangering state secrets, since communications channels are closely linked to the military, and furthermore, tapping would also become inconvenient.[19]

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[18] This was illustrated in the Deutsche telecom case where FCC tried to stop Deutsche telecom from investing in the US telecommunications company voice dream. Eventually the FCCC had to allow Deutsche telecom to invest as they had already allowed NTT to do so, and would be in breach of MFN. The FCC initially intervened and did not allow Deutsche telecom to invest, as that meant voice dream would have 25% foreign ownership. However, with German pressure, the FCC finally allowed Deutsche telecom the 25% investment. The Deutsche telecom case illustrates the extent to which foreign investment in telecommunications sector can be problematic, even in a developed country where telecommunications companies are well established and have a competitive advantage.

[19] WTO 'Foreign Direct Investment in Telecommunications and WTO's Basic Telecommunications Agreement' Lecture Materials obtained at WTO during fieldwork 2002-2003

In China, the concern for national security has resulted in telecommunications being kept under strict government control with little opportunity for direct foreign investment. National security and national sovereignty are of vital importance to the Chinese government as articulated in the 'Five Principles of Peaceful Existence'. These five principles form the Chinese core-ideology in international forums, and are based on national security and national sovereignty. They include:

- mutual-respect for sovereignty and territorial integrity,
- mutual non-aggression,
- non-interference with each other's internal affairs,
- equality and mutual benefits, and
- peaceful coexistence.[20]

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20 Qingjiang Kong 'China's WTO Accession: Commitments and Implications' in *Journal of International Economic Law* (2000) 656.

In order to ensure that these principles are protected, China's domestic laws and rules in the telecommunications sector remained obscure, non-transparent, and in many cases secretive.[21] This lack of transparency allows the Chinese to keep telecommunications a matter of state security under government control.[22]

The Chinese were reluctant to open up their telecommunications sector also because the penetration rate was extremely low and Chinese telecommunications market still had much potential to be tapped. It was the second largest telecommunications network in the world, and the fastest growing one. By 2002, China's telecommunications exchange capacity reached 201 million [lines], and mobile switching capacity 235 million. The total number telephone subscriber had grown to 350 million, with 188 million fixed users and 162 million mobile users, making China's network the largest in the world in terms of size and subscribers.[23] The Chinese wanted to keep the lucrative sector with immense market potential to their domestic players, which was counter to the WTO.

Telecommunications service providers in China were traditionally State Owned Enterprises (SOEs) with many links to the state.[24] Since it was primarily a government

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21 Even in 2000 when China was beginning telecommunications reform to enter into the WTO, the MII was not forthcoming in giving out information about its laws and regulations to Chinese legal practitioners. Interview with ex-MII official, summer 2001.

22 Interview with Ministry of Information Industry (MII) officials Beijing, Hong Kong July, 2001.

23 MII latest statistics (April 2002) at http://www.mii.gov.cn/mii/hyzw/tongjiziliao200203.htm

24 Most telecommunications technology came from the military, and the telephone lines were the life-line to security in China. In any country, there is general mistrust of allowing foreign entrants into the more important areas of telecommunications services. (e.g. fixed-line service)

dominated sector there was no need for telecommunication laws or a regulator. Telecommunications was subject to overall planning and industry administration under the information industry department of the State Council. The strong link with industrial policy meant that telecommunications was considered in relation to the overall plan for the development and construction of the information industry, which took into account the development goals of the national economy and social society.[25]

The telecommunications sectors strong linkages to national security and the legacies of state planning compounded with the non-transparent nature of Chinese politics/law provides a complex web of overlapping interests. Moreover, China is not a unitary actor, but is made up of many ministries with varying interests at the central level.[26] The tensions between central and local governments only complicate the matter further, and local telecommunications industries are the source of much local revenue. Particularly in telecommunications, there are many interests groups which bargain with each other to produce interesting policy outcomes.[27]

In light of this historical background, it becomes clear that such a revolutionary change for China, in terms of modernising its trade policy, would not likely be a smooth

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25 China para 72 TRM 2002 S/C/M/68

26 K Lieberthal and DM Lampton *Bureaucracy, Politics, and Decision Making in Post-Mao China* (University of California Press Berkeley ; Oxford 1992)

; SL Shirk *The Political Logic of Economic Reform in China* (University of California Press Berkeley ; Oxford 1993)

27 For a good analysis of the bargaining in telecommunications policy, see P Lovelock *The Evolution of China's National Information Infrastucture (NII) Initiative: A Policy Making Analysis* (University of Hong Kong, Department of Politics and Public Administration 1999) on file with author.

or rapid transition. Prior to accession, China's trade policies were coordinated and unified by MOFCOM, and there were less number of ministries and private entities involved. However after accession, with an increased number of players in trade policy making, MOFCOM's responsibilities are becoming difficult to deliver.

2 WTO IMPACT – WHAT CHANGED AFTER WTO ACCESSION?

China's entry into the WTO law is important for both China and the global community. China, with 1.3 billion people, has one fifth of the world's population, occupies four percent of world trade and has enormous clout in global trade. It is the ninth in world trade in volume, and has been forecasted to overtake the United States and become the number one trader in volume by 2030. China has the sixth largest trading economy, and as such, member states had much at stake with China joining the WTO. This resulted with the longest accession negotiations and commitments package in WTO history. The reasons for the length were covered can be summarised as legal, political and ideological conflicts the Chinese trade regime has with the principles embodied in the WTO. The degree of difficulty the Chinese government would have in implementing their WTO commitments for the telecommunications sector was anticipated in the early stages of the accession negotiations, and it was one of the last sectors to reach an agreement.

Spanning over 800 pages, China's Accession Package is the lengthiest legal document in WTO legal history.[28] China's relative importance in trade gave them greater

[28] Most other Protocol's of the newly acceding countries only have two page long main texts while China has an eleven page long main text.

responsibility to implement a tougher accession package.[29] China's commitments under the WTO are comprised of the following: China's Protocol to Accession (main text of eleven pages) and its nine Annexes, Schedule of Commitments (annexed to the Protocol – China's Good's and Services Schedules), and the Working Party Report (343 paragraphs of which 143 are incorporated into the Protocol according to paragraph 143 of WPR). These incorporated provisions of the WPR acquire the same binding force as those in the main text of the protocol.

Telecommunications services is covered by the GATS agreement. The purpose of the GATS agreements is to provide enforceable market access and non-discrimination for services and service providers, and stipulate certain disciplines on government regulation of services.[30] The service sector is increasingly becoming an important part of trade and comprises 60-70% of global GDP, 20% of global trade, and 55% of global FDI.[31]

Today with its 144 members, GATS covers 90% of world trade.[32] The GATS has three objectives; first it establishes a rule based framework for international transactions in services, second, it clarifies the obligations of WTO Member State within that

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29 Paragraph 9 of the WPR does state that 'Some members of the Working Party indicated that because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provision in the WTO agreements available to development country WTO Members'.

30 For a detailed discussion of the GATS agreement

31 WTO 'Foreign Direct Investment in Telecommunications and WTO's Basic Telecommunications Agreement' Lecture Materials obtained at WTO during fieldwork 2002-2003

32 D Sarooshi 'Commonwealth Developing Countries and the WTO Telecommunications Regime' in R Grynberg, E Turner and Commonwealth Secretariat. Economic Affairs Division. (eds) *Multilateral and Regional Trade Issues for Developing Countries* (Economic Affairs Division Commonwealth Secretariat London 2003) 9

framework, and third provides a legal institution so these obligations are observed. [33] The GATS establishes the first objective through the general types of rules which comprise the first section of the GATS. The second objective is realised through the schedule of commitments which make up the second half of the GATS package.

With reference to China, the Chinese representative stated in the 2003 that China's trade in services, particularly the importation of services, had seen a rapid development with the implementation of China's WTO commitments. [34] In 2002, China's importation of services increased by 21 percent and reached US$ 46.5 billion, which made China the ninth largest service importer of the world. China's services import volume for the first six months of 2003 was US$ 25.5 billion, which represented an increase of 14 percent over the same period in the preceding year.[35] This makes China's presence in services of significant importance.

Figure 1: Basic structure of China's Commitments in Services

	Services
Basic Principles	GATS

[33] D Sarooshi 'Commonwealth Developing Countries and the WTO Telecommunications Regime' in R Grynberg, E Turner and Commonwealth Secretariat. Economic Affairs Division. (eds) *Multilateral and Regional Trade Issues for Developing Countries* (Economic Affairs Division Commonwealth Secretariat London 2003)

[34] 2003 TRM. In comparison, in the US, exports of services totaled US$275.5 billion dollars and imports of services totaled US$199.7 billion.JK Chan and L Sherman 'A Chinese Promise to Partially Liberalize Its Services Market' China WTO Shaping the Future - Asia Law and Practice 111

[35] Chinese delegation statement 45 TRM 2003 S/C/M/69.

Additional Details	Services Annexes (eg. Reference Paper)
Market Access Commitments	China's schedules of Commitments

Telecommunications services is a new topic within the WTO.[36] Basic services are telecommunications services which carry voice or data on the network include services such as voice telephony, data transmission, telex, telegraph, paging and facsimile. Value added services are telecommunications services that added value to the basic services in form or content, or providing storage or retrieval on to the existing telecommunications services.

The Uruguay Round agreements covered the value added services, and the GATS come into force 1 January 1995.[37] For basic services, as in the Annex to Negotiations on Basic Telecommunications, there was a negotiating group for basic telecommunications established and further negotiations on the topic were conducted.[38] Agreement was reached in 1997 resulting in the Fourth Protocol to the GATS (or the Telecommunications Agreement) which came into force in 5 February 1998.

Under the GATS agreement, there are two basic principles for government policies affecting trade in services. These are transparency and MFN. These general obligations are applicable to all policies in the service sectors. The WTO telecom

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36 In principle all service activities were covered in the Uruguay Round negotiations. However, some sectors were excluded from the scope of the final agreements. These were: audiovisual, postal, courier and basic telecommunications services.

37 The member states had reached agreements on the value added (VA) telecommunications services, but not on the basic telecommunications services.

38 Adopted by Ministers in Marrakesh on 15 April 1994

agreement is essentially an agreement on trade of services, and thus only applies to foreign entrants operating in the Chinese telecom market, or the trade of telecom services. It does not relate to Chinese telecom operators in the Chinese market, and remains silent on the situation for the domestic telecom operators. The Reference Paper relates to the regulatory environment pertaining to foreign telecom operators, while this will indireacly influence domestic players, it is not the main focus of the agreement. However, in order to assure a transparent, WTO compliant regulatory environment in the telecom sector, the WTO agreements assumes a certain level of competition and regulatory transparency prior to the WTO implementation. These assumed conditions are prevalent in Western developed countries whom have had a decades of telecom deregulation and privatisation, but however are far from the pre-WTO existing situation in China.

The WTO and GATS agreement with regard to telecommunications requires the following:

- Market access (geographically, and periodically phased in as in table)
- National treatment.
- Most favoured nation; China should treat all other members equally for market access in the telecommunications services.

- Transparency and uniform application.

The Annex of Telecommunications requires 'access to and use of public telecommunications transport networks and services on a *reasonable* and *non-discriminatory* term and conditions for the supply of service included in its Schedule (para 5(a)).'

- Progressive liberalization (GATS 2000).

- Removal of technical barriers to trade tariffication and lowering of tariffs.

- The Reference Paper contains guiding principles or regulation. It stipulates the creation of a competitive, independent, and transparent regulatory regime.

Any exceptions to GATS Article XVI, XVII, and XVIII (includes specific commitments regarding market access, national treatment, and 'additional commitments.') shall be clearly indicated (GATS Article I).

The WTO commitments can be found in the following three types.

- Market structure (numbers of service suppliers, foreign ownership),

- services and facilities, and

- regulatory principles as found in the Reference Paper.

One result of the Chinese accession is that for the first time in history, access to China's telecommunications markets for foreign companies will be legalised.[39] The Foreign Investment Catalogue from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) which outlines the laws and regulations for foreign trade in China, traditionally prohibited foreign investment in the operation and management of telecommunications businesses.[40] Once a member of the WTO, China must reform the laws to be in compliance with its commitments.

China's commitments in the telecommunications sector also required significant institutional transformation in the Chinese regulatory environment. These commitments not only include SOE reform, but also pave the way for fair competition and foreign presence in the telecommunications sector. Telecommunications sector, being originally made up of SOEs, had no need to regulate or have any legislation. It was only in

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39 Later elaborated in detail in the section on CCF. Previously foreign direct investment was carried out through the 'Chinese-Chinese-Foreign investment model'. However, this was not binding, as Ministry of Trade and Economic Cooperation (MOFTEC) who is the ministry responsible for trade in telecommunications declared foreign investment in this sector illegal, and the Ministry of Information Industry (MII) stated that they were 'irregular' and must be 'rectified'. *See* L Chuang 'Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China' 20 Northwestern Journal of International Law and Business 509 (2000) 529 and East Asian Executive Report *Opening China's Telecom Market: Process is Slow, Nontransparent, Piecemeal and often Frustrating* 1998 International Executive Reports 20 NO .11 EAEXREP November 15 2 available on Westlaw last visited December 2001.

40 These provisions are more fully detailed in several of the older laws and regulations which disallows any form of foreign investment in telecommunications. The Foreign Investment Catalogue, List of Industries in Which Foreign Investment is Prohibited, Section 7(1). *See* J Eichelberger and A Allen 'A Legal Perspective: The Impact of WTO on Foreign Investment in China's Internet/E-commerce Sector' Perkins Coie LLP available at http://www.perkinscoie.com/resources/intldocs/twoimpact.htm last visited January 2002.

preparation for the WTO when telecommunications legislation become de-labeled as 'national secrets' and become a publicly discussed topic.

During the six years after accession, China must implement fundamental legislative measures, and eliminate the long-standing discretionary administrative practices and replace them with 'independent, transparent, and prudential' regulations.[41] They must have competitive safeguards to ensure appropriate measures are maintained for the prevention of anti-competitive practices.[42] Interconnection procedures and licensing criteria must be publicly available and transparent, and dispute settlement mechanisms are required to be established.[43] China has not agreed to full market access to foreign investors in any of the telecommunications sectors, but has agreed to partial liberalisation implemented over several years depending on the services and the geographic region.

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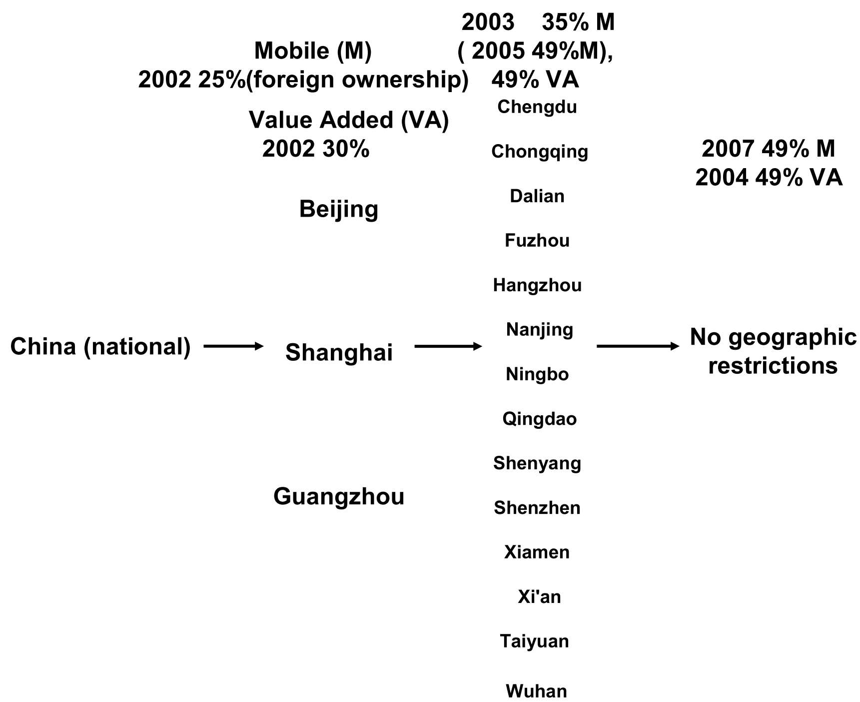
41 China has geographic restrictions and a phase in period of 6 years for the telecommunications sector. *See* discussion in J Janda and Men Jing 'Chapter 7 China's Great Leap of Faith: Telecommunications and Financial Services Commitments' (forthcoming, on file with author) 3,4.

42 Baker & McKenzie China's Accession to the World Trade Organisation: Opportunities in the Telecommunications Sectors (China Practice Group Hong Kong November 2001) 1.

43 Interconnection refers to the phenomena where two means of communication link up at one point. For example, when mobile phones call another country, they go through cells that connect mobile phones, and then use land lines to into another country's communication system. This connection between the cell and landline requires the mobile company to pay interconnection fees to the landline company, the fairness of such a fee is the centre of debate in the WTO Reference Paper. *Ibid.*

Figure 2 China's commitments for the telecommunications sector under the GATS agreement (BA)



The period and geographic phase in approach taken in the commitments are a reflection of how trade related ministries were more powerful during the accession negotiations. The Chinese telecommunications commitments do not make sense from a telecommunications point of view – however, from an economic/development perspective, the phase in approach was the ideal way to ease China into the global telecommunications market. This kind of ministerial imbalance in the decisive powers are exacerbate turf wars, and later we will see how the power balance shifts in favor of the telecommunications related ministries after accession.

China's commitments in telecommunications, aside from the geographic phase-in approach for liberalisation which is unique to China, are compatible with the other members of the WTO.[44] However, when one considers the history of protectionism in the telecommunications sector in China, the commitments that seem modest *prima facie* prove revolutionary. As one UNCTAD official states, the Chinese commitments in services were clearly above anything anticipated in the negotiations, and were much more ambitious when compared with any other developing country.[45] Other than the fact that its infant industries are no competition to the telecommunication companies of the

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44 The geographic phase-in approach was recommended by the Chinese negotiation committee as a way of overcoming difficulties in the implementation. Interviews at WTO and Chinese delegation members 2002,3.

45 Whether or not China was a developing country was a contentious topic in the accession negotiations. However, by the time China joined in 2001, already in its 6 year since the beginning of the WTO, most of the benefits accorded to developing countries were already phased out, so the issue of developing country was no longer relevant. Interviews at UNCTAD, Geneva September 2001. Bukevickeni et al. as quoted in Japanese governmental document, Yamaoka. China's status as a developing country is a contested one, however when one considers that China is number 94 between Grenada (93) and Dominica (95) in the US human development index, trading power would qualify to be called a developing country. http://hdr.undp.org/reports/global/2004/pdf/hdr04_HDI.pdf

economic giants, telecommunications in China has been a traditionally protected industry with strong links with national security. With this consideration in mind, market access in the telecommunications services sector being open to foreign investment (up to 49% basic and 50% value-added) is quite an achievement for WTO members.

When former Vice-Premier Zhu Rongji visited former President Clinton in Washington D.C., May 1999 China's intention of opening its telecommunications sector was leaked to the press.[46] This was of course kept secret from the Ministers of telecommunications related ministries. Once former Minister Wu Yi of the MII heard this news through the foreign press, he threatened to resign, and deregulation of the telecommunications sector became a hot topic in Chinese politics.[47] This incident illustrates the extent to which telecommunications related ministries were not that involved in trade policy prior to accession. Much of the telecom policy during the accession negotiations were left to the trade related ministries. As such, then Minster Wu only found out about the commitments he would have to implement post-accession through the US media.

These turf wars between the 'pro-WTO reform' and 'anti WTO reform' within the Chinese government were contained before accession, but once a member, the telecommunications ministries had more say in trade policy, and consequently, there were

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46 Interview with WTO delegation member summer 2001.

47 Interview with WTO delegation member summer 2001.

more heated debates between the conflicting parties. These ended in near breaches of the WTO as covered in the latter sections of the paper.

Impact of WTO

The impact of the WTO has been enormous.[48] A Western observer suggests, '[t]hat economic engagement with China... is actually causing the political changes that the proponents of engagement have predicted.'[49] However, as one US Congressional analyst argues: 'WTO obligations have often been hampered by resistance to reforms by central and local government officials seeking to protect or promote industries under their jurisdictions, government corruption, and lack of resources devoted by the central government to ensure that WTO reforms are carried out in a uniform and consistent manner…..'[50]

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[48] This is particularly more pronounced in the South where Deng's policy of economic reforms found more footing in concrete policies.

[49] James Kynge, 'China's bold political reform,' Financial Times, 12 January 2003

[50] 'China-U.S. Trade Issues,' CRS Report No. IB91121, 16 May 2003 p8, 9

Trade policy has become a complicated process with China's accession to the WTO. This can be exemplified in the following three cases: the CCF case, the MII vs. SARFT case and the 750% rise in interconnection case. While not a direct breach of WTO agreements, and resolved outside the WTO dispute mechanism, these actions proved the extent of intensified turf wars and conflicting interests in the lead up and after WTO accession.

Trade policy prior to WTO accession was primarily dictated by the MOFCOM (previously MOFTEC). Although there was participation of the MOFA and other relevant ministries such as the MII, it was limited. Most decisions were taken by MOFCOM with trade and economics playing the most important role. However, once a member of the WTO, the emphasis has shifted from negotiation to implementation/compliance. As such, MOFCOM has taken a less prominent role, with the responsibility of implementation/ compliance given to the ministries in charge of the relevant trade sectors. As such, the level of participation of the domestic trade related ministries were magnified, and the numbers of ministries taking part in trade policy had increased enormously.

In the case of telecommunications, the complexity of trade policy making was not only complicated by the number of ministries involved, but it was compounded with the involvement of the newly privatised 'telecommunications operators' such as China telecom.[51] Since telecommunications was a lucrative sector, the telecommunications operators had influence over trade policy in the sector. In the days were

[51] Other telecommunications operators include: China mobile, China Unicom, Jitong, Tietong.

telecommunications were provided solely by the SOEs, telecommunications was a major source of revenue. Consequently, trade policy now involved both governmental and non-governmental entities all with conflicting interests, which further exacerbated the problem of generating a uniform trade policy.

The cases show that after China became a member of the WTO, there were more ministries involved in trade policy with conflicting interests. However, with the WTO, China was also more responsible for having fair trade practices. As a result, practices contradictory trade policies of the WTO, became an issue the Chinese government had to grapple with.

Turf Wars

There were some structural changes in the bureaucracy to facilitate trade policy coordination. In early 2003, the NPC-mandated changes to the structure of the State Council. One of the reasons for these reforms was to lessen turf wars. It was hoped that by streamlining ministries there would be less conflict between the ministries, and trade policy could be generated in a more stable environment. However, the turf wars are embedded and with a long history, and thus cannot be eradicated over night. MOFTEC, the former SETC, and the former SDPC were merged together to form the new Ministry of Commerce (MOFCOM). Having all the trade related issues under one Ministry, MOFCOM, it was possible to have more consistent, coherent trade policy.

A previous bureaucratic restructuring in 1998 preparation for the WTO brought together the Ministries of Posts and Telecommunications and other ministries related to telecommunications. The MII and its provincial branches are the primary regulators and policy makers for the telecommunications sector. The MII is responsible for the regulatory planning, distribution and allocation of nationwide public telecommunication resources. The telecom administration authorities of the provinces, autonomous regions, and municipalities refer to the telecommunications regulatory bureau in the irrespective jurisdictions.[52] The MII supervises and administers the telecommunication industry at the national level; and the provincial regulatory bureaus supervise and govern the telecommunications industry in their respective region under the direction of the MII.[53]

Previous to the WTO, MII and its local counterparts were also the practical service providers in the sector. However, under these kinds of circumstances, as the service providers were also SOEs who were directly linked to the interests of the government, it was more difficult to abide by the non-discrimination principle. The Reference Paper requires China and MII to become independent; the regulator cannot be both the regulator and service provider at the same time.[54] However, the MII is not structurally and financially completely separated from all telecom operators and

52 Telecommunication service providers can only apply for a nationwide license from the MII. Para 68 China TRM 2002 S/C/M/68

53 (Para 67 China statement TRM 2002 S/C/M/68)

54 (Para 28 TRM 2002 S/C/M/63 China)

providers, and ATT in its testimonial to the USTR contests that MII is said to have a dual role as protector of SOEs and the industry regulator.[55]

China signed on to the WTO as one country, and as such, must have uniform implementation. However, China is far from a monolithic country. It has negotiated as one country, with MOFCOM (then MOFTEC) as the lead, however while negotiation is still the responsibility of MOFCOM, the implementation of telecommunications is now in the hands of MII. According to the requirements of the WTO, the ministries related to trade and each sector such as telecommunications were merged into one ministry respectively to avoid any kind of turf wars in the implementation of the WTO. While the conditions for trade related ministries were improved with the streamlining, the telecommunications related ministries were increasingly become involved with more say in the direction of trade policy in the sector. Telecommunications trade policy involved more ministries post-WTO accession; and as the telecommunications related ministries had very different interests to the trade related ministries, it only aggravated turf wars in telecommunications trade policy.

Figure 3 Simplified organization chart of Telecommunications/WTO related ministries.

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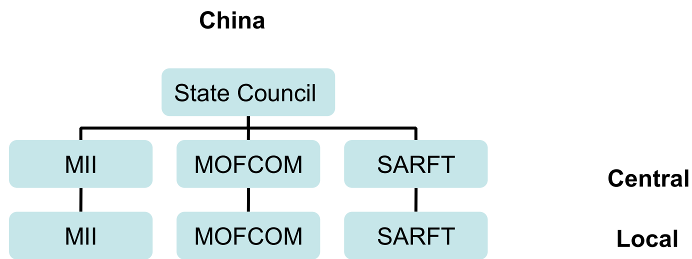
[55] (US statement para 36 TRM 2002 S/C/M/68) (Para 68 US statement TRM 2003 S/C/M/69)

Forces vs. ROL = Turf Wars/Central-Local Relations/Local Protectionism (Guanxi)



Examples:

- **Clinton – Zhu talks in Washington DC May 1999 ←→ Minister Wu (MII)**
- **Increase of connection charges by 750% in October 2002**
- → **LACK OF 'KNOW-HOW'** → Violation of Reference Paper
- Google Blocked September 2002 → Violation of transparecncy

CCF

Prior to accession, China has had significant anti-WTO, non-transparent, and even erratic practices in the telecommunications sector. There were the CCF enterprises, where Foreign telecommunications companies were licensed to operate in telecommunications services through the CCF model utilizing a loophole in trade legislation.[56]

Figure 4 China – China – Foreign Model of Interestment

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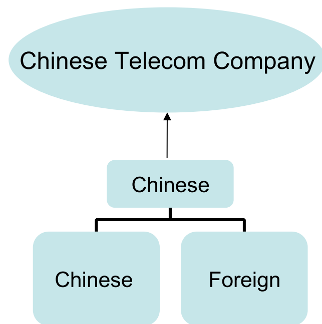
Telecom in China Pre-WTO



- MOFTEC catalogue prohibited investment in Telecom
- Closed eye to CCF financing mechanism
- 45 projects between Unicom and 20 firms (Sprint, NTT, Bell Canada, and Cable & Wireless HKT) totaling US 1.4 $ billion
- MII suddenly announced September 1999 that it was irregular and should be prohibited

The lucrative Chinese market even lured foreign investors when foreign participation in telecommunications was forbidden under the Catalogue. Legal uncertainty was both a positive and negative aspect of China's legal environment pre-WTO. The uncertainty caused grievances for many foreign investors since the 'green light could turn red the next day.'[57] However, this ambiguity, which created problems, also provided opportunities for many foreign companies. One example is the China-China-Foreign (*Zhong-Zhong-Wai* hereinafter CCF) investment. The CCF was not a financial scheme unique to the telecommunications sector, but included some important joint ventures telecommunications services. CCF would involve three parties: two Chinese companies and one foreign company. The foreign company would form a joint venture with a Chinese company in the non-prohibited sector, and this C-F joint venture would invest in a Chinese company which operates in a foreign prohibited sector. The money from the foreign company would be funneled through the CF company to finance the projects in the second joint venture company which is formed with the Chinese partner in the prohibited sector. The foreign company would get the returns from such projects through the two joint venture companies.[58]

Pre-WTO, telecommunications was a 'forbidden' category for investment under the MOFCOM (previously MOFTEC) Investment Catalogue (the 'Catalogue' for short).

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57 Interview Tianjin Morishima

58 'China Sets Limit on 'Unicom-Invented' Investment Model, Impact Hotly Debate at China Telecom 2000 Conference in New York' 7 October 1998 PR Newswire Available on Lexis

The Catalogue provides guidelines for foreign investment in China.[59] Foreign investment in the Chinese economy are divided into either ‘encouraged’, ‘discouraged’ or ‘forbidden’ sectors. In Section VII, Part of the Prohibited Foreign Investment Industries Chapter, the Catalogue, expressly prohibits foreign investment in the management of telecommunications business. Since the telecommunications services supports the national communication line, and has strong links with national security, telecommunications was an area the Chinese government wanted to protect from foreign intervention.[60] This became impossible with the development in telecommunications liberalisation in the Uruguay Round and the GATS.

There were many foreign telecommunications companies involved; there were some 39 companies taking part in CCFs.[61] They believed that by taking part in the CCF, they would have ‘one foot in the door’ if and when China opened up its telecommunications market.[62] CCF presented a means for the weak telecommunications industries to absorb foreign funds and technology. MOFTEC turned a blind eye to CCFs

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59 MOFCOM, formally MOFTEC webpage http://www.moftec.gov.cn/moftec /html/laws_and_regulations/investment25.html

60 Communication technology is strongly linked to military technology. For example the intial trial for the mobile technology of CDMA was held inside the People’s Liberation Army, and the military devised China’s own version of mobile technology. (Interview Tsen Beijing)

61 These companies include Sprint International, Wiresless Electronique LTD.(i.e WelCOM), Daewoo, Bell Canada International, France Telecom, NTT and Deustche Telecom.L Chuang 'Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China' Srping 2000 Nrotwestern Journal of International Law and Business 509, 528

62 Unicom was one of Chinese partner companies that were quite active in the CCF; they managed to absorb 72% of their funding through the scheme Interview Beijing 'China Sets Limit on 'Unicom-Invented' Investment Model, Impact Hotly Debate at China Telecom 2000 Conference in New York' 7 October 1998 PR Newswire Available on Lexis

in the beginning, however, started to tighten control when there was enough technology and funds transferred to the Chinese companies to their full extent.[63]

The MOFTEC Catalogue was loosely worded and allowed this loophole to exist until 1998. This was when MII decided to clear non-WTO practices, and assert its power as the leading ministry in the implementation of WTO. While this action created uniform trade practices in the telecommunications, this sudden shift in policy came with out much warning, and these practices in China were far from the predictable, transparent system of operation that the WTO envisions.

MII then declared them ‘irregular’ and must be ‘rectified’. MII declared them ‘irregular’ MII but never stated these projects were ‘illegal’: however ‘irregular' implied that they were problematic and had to be addressed. When MII cancelled all CCFs, the settlements were confidential: investors were given back their initial investments plus interest in Chinese bank terms, but their administrative expenses were not refunded making the foreign investors suffer considerable economic damages.[64]

Once a member, China was required to have consistent trade policy – as such, MII who would be responsible for the implementation of telecommunications trade policy took a more proactive role in the lead up to accession in order to show that China was a responsible member of the global community. The CCF showed that MII was more

63 Interview Beijing Telecom companies, conducted at Telecom Expo Beijing 2003.

64 M Forney and J Dean 'China Unicom Prepares for Ipo by Ending Foreign-Firms Ventures' 3 April 2000 Wall Street Journal A26, L Chuang 'Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China' Srping 2000 Nrotwestern Journal of International Law and Business 509

concerned to protect its infant industry and gain competitive advantage, rather than keep foreign investors content, which would be the more WTO constituent approach. Once foreign funds and know-how had been absorbed, MII felt it was time to clamp down of the CCFs.

The CCF case illustrates how different ministries within the Chinese government have different interest. While turf wars prior to accession did not have direct impact on trade policy prior to the WTO, after accession, it is anticipated to translate into more heated debates or conflict.

MII and SARFT

According to Lardy, 'In its WTO negotiations, China's MOFTEC negotiators made commitments in services without sufficiently consulting with the relevant domestic regulators'.[65] As mentioned earlier, Zhu Rongji made concessions in the telecommunications sector without consulting MII minister Wu when he visited Clinton in May 1999.[66] Since Wu was not consulted about these concessions prior to Zhu offering it to Clinton, and only found out about it when it was leaked to the press, Wu objected in a dramatic matter, and threatened to resign. These differing interests in the

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65 N Lardy 'Problems on the Road to Liberalisation' 15 March 2002 Financial Times (London, England) http://www.brookings.edu/views/op

66 JJJ Tkacik 'Information Ministry Chief's Resignation Is a Letter to Bill Clinton' China Online held on Heritage Foundation website http://www.heritage.org/Press/Commentary/ED050499.cfm?RenderforPrint=1

telecommunications sector breed turf wars and departmental politics that are complicated with the responsibilities related to WTO accession.

Prior to accession – the turf wars were still contained, but post-accession, the trade policy has become even more complicated. Serious turf wars exist and can be identified in the struggle for the right for telecommunications legislation. Each Ministry, commissions, and other departments of the State Council have the power to legislate laws in its particular issue area. Any rules below the Ministry are called *tiaoli* (regulations) and are not *falu* (law), however, occupies a comparable position in society. There are also law-making powers vested in the local governments: provincial people's congresses and their standing committees and the provincial governments have the power to issue local regulations and rules.[67]

Authorities having overlapping legislative rights have had extensive turf wars. For example, the State Administration of Radio, Film and Television (SARFT), the management authority for cable networks, and Ministry for Information Industry (MII) the management authority for telecommunications, have disputed over the legislative rights for cable telephony.[68] Due to convergence in telephony, radio/television and

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67 Working Party Report para 6. *See* Chapter 3.

68 Beijing interviews MOFTEC, business councils. 'MII Hints at Further Sector Liberalisation' 12 July 2001 People's Daily available at http://english.people.com.cn/english/200107/12/eng20010712_74828.html

telephone technologies are increasingly coming closer, adding tension to the turf wars between the SARFT and MII.[69]

For example, the cable network has broader bandwidth than the telecom network, and can provide better services in Internet access, video-on-demand and interactive shopping. Since neither ministries want to compromise, the turf wars have become heated, pushing ministries to self-destructive measures.[70] SARFT and MII were both were jeopardizing their own long term interests by waging a lengthy turf war. Each authority was employing hidden strategies to weaken the other ministry's authority.[71]

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69 ‘Convergence refers to the coming together of several formerly distinct services and industries’. W Lake, L Charytan and M Brill 'Telecommunications Convergence: Implications for the Industry and for the Practising Lawyer' March 2000 9 PLI 9

70 There were instances where local SARFT and MII officials were found to be pulling out each other's cables. Interview Beijing 2002-3.

71 For example, in 2002, local level SARFT and MII in the southern provinces were pulling out each other's cable wires. BJ Goldstein and Patt interviews.

This extensive turf war was resolved with the intervention of the State Council; television transmission was excluded from the authority of the MII, but telecommunications networks and radio and television transmission networks were generally under the MII.[72] It was decided that production and broadcasting of radio and television programs will be regulated by the SARFT, and network and transmission will be operated by telecommunications companies and regulated by the MII.[73]

With the SARFT and MII turf war being resolved by the State Council, some local cable broadcasting companies have started trial operations in telecom businesses supervised by MII in cooperation with SARFT. One such example is internet access via the cable network.

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72 State Council, Telecommunications Regulations 25 September 2000, Article 45

73 Hu Shuli 'Restructure China Telecom: An Interview with Wu Jichuna' Ciajing available at http://caijing.homeway.com.cn/caijing/monthly/200001/index.html

These tensions on the horizontal level at the central government also exist vertically between the central and local governments. The central-local communication channels are particularly difficult, and in services, there are many interested parties in each of the ministries and the different localities, thus, exacerbating the complications for trade policy at the national level. Local governments were most interested with what would be beneficial to their local governments, so implementing and complying with the WTO was not of the foremost concern to local governments. These turf wars are exacerbated central-local relations, and China is becoming a breeding ground for WTO related disputes.

Interconnection

The Reference Paper requires interconnection with an incumbent carrier to be available to competitors at any technically feasible point in the network upon request. The interconnection should be timely, cost-based, transparent, and non-discriminatory. (para 2 of Reference Paper) This was re-enforced in the *Mexico-Measures Affecting Telecommunications Services* case (WT/DS204/R Telmex Case for short), where MCI and AT&T, who were respectively partial owners of Alestra (45%) and Avantel (49%) lobbied the US government to claim Telmex in breach of the GATS Reference Paper.[74]

In the Telmex Case, the panel found Telmex's interconnection rates for the US telecommunications suppliers were not 'cost-oriented' within the meaning of Section 2.2 (b) of the Reference Paper. The panel stated that 'since by any of the methodologies

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presented to the Panel, by the United States, they are substantially higher than the costs which are actually incurred in providing the connection', and concluded that Mexico 'had failed to fulfill its commitments under Section 2.2(b) of the Reference paper.' The panel went on to say that Mexico should have provided interconnection to the US on a 'facilities basis under cost-oriented rates.' (Paras. 7.217-221)

The Telmex case attests to the progressive development of international telecommunications regulation, and shows that the GATS and the Reference Paper are becoming utilized to define the practices in telecommunications. Interconnection is fast becoming the most problematic of areas for trade in telecommunication services.

With respect to China, according to the Chinese representative in the 2002 TRM, the Chinese interconnection settlement standards were to be based on cost. This was in order to have the interconnection fees comply with international practices. The Chinese also signalled their willingness to strengthen cooperation with other Members and share their successful experiences with respect to interconnection cost and settlement standards. (China para 71 TRM 2002 S/C/M/68)

According to *Regulation on Telecommunications of PRC* and the *Regulation on Interconnection Between Public Telecommunication Networks*, leading telecom operators should develop rules on interconnection and report them to the MII for approval prior to implementation.[75] In the Regulations of Telecommunication of China, dominant telecommunications carriers established interconnection rules and procedures, guided by the principles of non-discrimination and transparency. Leading telecom operators were required to provide interconnections within the specified time limit, and were neither allowed to deny request for interconnection from other telecom operators and private network operators nor permitted to freely restrict the right of users to chose the telecom services provided by other operators.[76] (China para 77 TRM2003 S/C/M/69)

Leading telecommunication operators were required to ensure that the quality of the inter-network connection service they provided to other telecommunication operators was the same as they provided within their own networks or to their subsidiaries or branches. The dominant carriers had the obligation to adopt the necessary technical measures to ensure that consumers enjoyed their network call functions. (para 69 China statement TRM 2002 S/C/M/68) (Para 27 China TRM 2004 S/C/M/75)

In offering inter-network connections to other telecom operators, the service quality of leading operators were required to be as good as that of like services within their own networks or that of like services supplied to subsidiaries or branches. Leading telecom operators had an obligation to coordinate with users acquiring telecom network

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[75] Temporary Regulations on Telecommunications Network Interconnection, promulgated by MII on 7 September 1997 http://www.fjqi.gov.cn/FLFG/FL/fbzdjzf.htm This was abolished and replaced by the Administrative Regulation on Public Telecommunications Network Interconnection, promulgated by the MII 10 May 2001 http://www.mii.gov.cn/mii/zcfg/05-29-01.htm

[76] Order 291 of the State Council and its administrative regulation on interconnection of public telecommunication networks, dominant carriers referred to those who controlled the necessary facilities of basic telecommunications and held more than 50% market-share in the fixed local telephone business and the level of local network, and were able to substantially influence other telecommunication carriers entering market. (Para 27 China TRM 2004 S/C/M/75)

code number resources in order to realize the function of the resources, with necessary technical measures. (China para 77 TRM2003 S/C/M/69)

Interconnection agreements between public telecommunications networks and between public and specific telecommunications networks were concluded on the basis of consultations between the parties and according to the Administration Regulation on Networks Interconnection and were filed with the MII. (China para 71 TRM 2002 S/C/M/68)

However, in October 2002, in preparation for the IPOs of China telecom, MII issued confidential circular advising China telecom to raise its interconnection charges overnight, so profits would improve in its preparation for the IPO on the Hong Kong and New York stock markets. [77] While MII believed this would make China Telecom a more desirable company, this action only attracted criticism from the WTO members. [78] The result made foreign telecommunications companies also raise their international call rates to China in order to still make a profit. Consequently the foreign companies limited their access to China in order to still generate profit, but there was two week period where making international phone calls to China became very difficult.[79]

The raise in 750 percent in interconnection charges was a clear breach of the WTO telecommunication agreements, especially the reference paper.[80]

In October 2002, China telecom increased its interconnection rates by 750% overnight.[81] MII sent a confidential circular advising China telecom to raise its interconnection charges so profits would improve in its preparation for the IPO on the Hong Kong and New York stock markets.[82] The result was an increase in interconnections charges

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[77] Fieldwork observation and interviews 2002-3

[78] China telecom had its IPO for the Hong Kong and New York Stock Market in October 2002. Interview –Beijing 3

[79] International calling companies need to pay interconnection charges to China telecom, since they would be using China telecom infrastructure to provide international calls to China. When one calls internationally, although we are using one international calling company, we are relying on the services of several telecom companies. The international calling company rarely owns the infrastructure used to provide the service, but rather pays interconnection charges to the indigenous telecom companies and packages it as under their own brand for consumers.

[80] For detailed analysis refer to previous chapter.

[81] Fieldwork observation and interviews 2002-3

[82] China telecom had its IPO for the Hong Kong and New York Stock Market in October 2002. Interview – Beijing 3

overnight which made foreign telecommunications companies also raise their international call rates to China. Consequently the foreign companies limited their access to China in order to still generate profit, but there was two week period where making international phone calls to China became very difficult.[83]

This incident illustrates the extent to which MII is still strongly linked to China Telecom. While the Chinese government takes the stance that MII is an independent regulator, it is still indirectly dictating how China telecom should be managed. MII is independent in paper and in the law. However, if MII was truly independent, it should not take an interest in how China Telecom does in its IPO. The mere fact that the MII was interested in making China telecom's IPO successful shows that the relationship between MII and China telecom is still strong, and that MII is far from being an independent regulator.

This case illustrates that the WTO's impact on China's existing telecommunications regime is divided. Since the WTO commitments require China to effectively break its monopoly and deregulate the telecommunications sector. The relationship between the MII and China telecom are very close, so in the short term, this can translate into non-WTO compliant behaviour as the sudden raise in interconnection fees. However, it the long term, since the interests of MII and China telecom are becoming more independent of each other, there will be future struggles between the two arising. This complicates trade policy in telecommunications sector even more, as conflict of interests will exist not only within governmental organizations but also between government and non-government entities such as MII and China Telecom. By dividing interests between the regulator MII and China telecom, the environment in

[83] International calling companies need to pay interconnection charges to China telecom, since they would be using China telecom infrastructure to provide international calls to China. When one calls internationally, although we are using one international calling company, we are relying on the services of several telecom companies. The international calling company rarely owns the infrastructure used to provide the service, but rather pays interconnection charges to the indigenous telecom companies and packages it as under their own brand for consumers.

which WTO has to be implemented has, and will get more diverse and complicated involving many conflicting interests.

CONCLUSION

The WTO has brought a new wave of trade related reforms – these were not implemented overnight, but were rather a long drawn out process, conducted in parallel with the accession negotiations. For China, becoming a member of the WTO became an impetus for the liberalisation of trade, and the opening up of traditionally closed sectors such as telecommunications. While WTO related reforms were initially implemented for bettering uniformity in the country's trade policy, the environment for creating trade policy has become diversified and more complicated a process.

Prior to the WTO, the decisive powers were in the hands of MOFCOM, the ministry in charge of trade. While there was the participation of other ministries, they did not have much say in the direction of China's trade policy. In terms of the telecommunications sector, this resulted in China singing on to an agreement which was difficult and unpractical for the telecommunications ministry to implement. While the agreement made sense in trade and economic terms – gradually opening up of the telecommunications sector in the areas of the country which have competitive advantage comparable with foreign telecommunications companies – it was unpractical and complicated to regulate from the telecommunications point of view. With a quick examination of China's telecommunications commitments, it becomes apparent that the WTO negotiators were from trade backgrounds and not telecom experts.

However, once China had joined the WTO, and the focus was away from the negotiations and was now on implementation/compliance. The responsibility shifted from the trade ministry MOFCOM, to the telecommunications ministry MII.[84] Compounded with privatisation in the telecommunications sector – the entities involved in telecom trade policy were not only the trade and telecom ministries, but also the newly more independent operators such as China Telecom. The aforementioned three cases of near breaches of the WTO (the CCF, the MII vs SARFT, and the 750% increase in interconnection fees) show that trade policy post-WTO accession was more complicated, involving an increasing number of ministries and private entities. As WTO representation was still conducted with MOFCOM the lead, with MOFA and State Council following closely behind, WTO trade policy includes all these entities with conflicting interests.

The case of telecommunications illustrates, trade policy post-WTO is a more fragmented, complicated process, whereby contrary to all the reform efforts, has created an environment difficult to implement and comply with the WTO.

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[84] MII shared responsibility with SARFT in areas involving cable.